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Nos. 00-596 and 00-597

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Lorillard Tobacco Company; Brown & Williamson Tobacco Corporation; R.J. Reynolds Tobacco Company; Philip Morris Incorporated; and U.S. Smokeless Tobacco Company,

Petitioners,

- and -

Altadis U.S.A. Inc., As Successor To Consolidated Cigar Corporation and Havatampa, Inc.; General Cigar Co., Inc.; John Middleton, Inc.; Lane Limited, As Successor To Tobacco Exporters International (USA) Ltd.; L.J. Peretti Co., Inc.; Swedish Match North America, Inc.; and Swisher International, Inc.,

Petitioners,

v.

Thomas F. Reilly, Attorney General
of the Commonwealth of Massachusetts,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER U.S. SMOKELESS TOBACCO COMPANY

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QUESTIONS PRESENTED

1. Whether strict scrutiny should be applied to content-based restrictions on truthful, nonmisleading smokeless tobacco advertising when the restrictions are designed to suppress speech for reasons unrelated to ensuring a fair bargaining process.

2. Whether under *Central Hudson* a State may meet its burden of showing that restrictions on speech directly and materially advance the asserted interest by submitting data that either tend to contradict or fail to support the State's justification for the restrictions.

3. Whether under *Central Hudson* restrictions on speech, promulgated for the ostensible purpose of addressing minors' smokeless tobacco consumption, are no more extensive than necessary when the State foregoes alternative measures and its own data show a "significant" and "steady" decline in such consumption.

STATEMENT PURSUANT TO RULE 29.6

Amending its prior Rule 29.6 Statement, Petitioner states that effective January 1, 2001, it changed its name from United States Tobacco Company to U.S. Smokeless Tobacco Company. There are no other changes to its prior statement.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30 (1st Cir. 2000). Pet. App. 1a-45a. The memoranda and orders of the United States District Court for the District of Massachusetts are reported at *Lorillard Tobacco Co. v. Reilly*, 76 F. Supp. 2d 124 (D. Mass. 1999), and *Lorillard Tobacco Co. v. Reilly*, 84 F. Supp. 2d 180 (D. Mass. 2000). Pet. App. 46a-60a and 61a-104a, respectively.

JURISDICTION

The United States Court of Appeals for the First Circuit entered its judgment on July 17, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The regulations of the Massachusetts Attorney General that give rise to this case are codified at 940 C.M.R. §§ 21.00-.07. Pet. App. 105a-14a. The statute under which these regulations were promulgated is Mass. Gen. Laws ch. 93A, § 2. Pet. App. 127a.

The First Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment, provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

STATEMENT OF THE CASE

Petitioner U.S. Smokeless Tobacco Company ("USSTC")[1] respectfully submits this Brief in order to present facts and arguments that are uniquely applicable to USSTC, the only Petitioner challenging the regulations of the Massachusetts Attorney General specifically with respect to smokeless tobacco.[2] While it joined with Lorillard Tobacco Company, Brown & Williamson Tobacco Corporation, R.J. Reynolds Tobacco Company, and Philip Morris Incorporated (the "Cigarette Petitioners") in seeking *certiorari*, USSTC commenced its own action challenging the regulations in the District Court. *See* JA 16-26. Although its action was consolidated below with the related cases filed by the Cigarette Petitioners and the cigar manufacturer and retailer Petitioners, USSTC has throughout the course of this litigation maintained its own, separate claims.[3]

During a period of time in which the State itself recognized that there has been a "steady and significant decline" in underage smokeless tobacco consumption

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1. Effective January 1, 2001, United States Tobacco Company changed its name to U.S. Smokeless Tobacco Company. For ease of reference, and in order to avoid confusion, only the new name is used in this Brief.

2. USSTC is challenging the following provisions of the regulations in this Court: 940 C.M.R. §§ 21.04(2)(c), 21.04(2)(d), and 21.04(5).

3. Whenever possible, USSTC relies on the Brief submitted by the Cigarette Petitioners, and limits its presentation here in order to avoid repetition.

(Cir. JA 4580),[4] the Massachusetts Attorney General, as part of his declared "war against Big Tobacco" (JA 248), promulgated regulations ostensibly to address the incidence of, *inter alia*, underage smokeless tobacco consumption (Pet. App. 105a). The regulations amount to a virtual ban on smokeless tobacco advertising in metropolitan Massachusetts. At the same time, Massachusetts was spending up to sixteen million dollars per year on anti-tobacco advertising. *See* JA 92. In its decision upholding the regulations against all challenges, the Court of Appeals noted the "sharp decline in the use of smokeless tobacco by young people" (Pet. App. 23a) and expressly acknowledged USSTC's "frustration at increased regulation while current efforts seem to be bearing fruit" (*id.* at 24a).

PROCEEDINGS BELOW

On May 26, 1999, USSTC filed its Complaint for Declaratory and Injunctive Relief in the United States District Court for the District of Massachusetts, challenging the validity of certain provisions of the regulations primarily on the grounds that they violated the First Amendment and the Supremacy Clause. JA 16-26.

The District Court granted in part and denied in part Petitioners' cross-motions for summary judgment on First Amendment grounds, upholding the regulations except for its ruling that 940 C.M.R. § 21.04(5)(b), which prohibits indoor advertising below five feet, was unconstitutional. Pet. App. 82a-83a. In addition, in a separate memorandum and order, the District Court granted in part

4. The Joint Consolidated Appendix filed in the United States Court of Appeals for the First Circuit is referred to in this Brief as "Cir. JA."

and denied in part Petitioners' cross-motions for summary judgment on preemption grounds. *Id.* at 59a-60a. The District Court held that the only section of the regulations preempted by the FCLAA was 940 C.M.R. § 21.04(6), which permitted outdoor signs limited in size to 576 square inches and to the words, "Tobacco Products Sold Here." Pet. App. 57a, 59a-60a.

The District Court entered final judgment on January 25, 2000, and USSTC filed its notice of appeal the next day. JA 6. The Court of Appeals stayed the regulations pending appeal on January 31, 2000, and thereafter consolidated the various District Court cases for review. *Id.* at 8-9. On July 17, 2000, the Court of Appeals, with the following exception, affirmed the District Court's First Amendment decision: it reversed the District Court's ruling for Petitioners on indoor advertising below five feet, thus upholding the regulations in their entirety against the First Amendment challenges. *Id.* at 31a-32a, 45a. In addition, the Court of Appeals affirmed the District Court's decision as to preemption. *Id.* at 13a, 45a.[5]

On January 8, 2001, this Court granted *certiorari* in this case and related case no. 00-597, and consolidated them for review.

5. The District Court's decision that 940 C.M.R. § 21.04(6) is preempted by Section 5 of the Federal Cigarette Labeling and Advertising Act, as amended, 15 U.S.C. § 1334 (the "FCLAA"), and nonseverable as to smokeless tobacco was not appealed by the Attorney General and therefore was not at issue in the Court of Appeals. Pet. App. 6a & n.2. USSTC contended below that if the regulations are preempted as to cigarettes, then they should be preempted by the FCCLA with respect to smokeless tobacco on the grounds that the regulations cannot be severed in their application between the two. To the extent that this Court finds the regulations preempted by the FCCLA, they should be invalidated as to both cigarettes and smokeless tobacco.

FACTS

Petitioner USSTC, through its subsidiaries, manufactures smokeless tobacco products and engages in truthful and nonmisleading advertising throughout the United States and in Massachusetts. Cir. JA 3754-62. USSTC's advertising promotes its smokeless tobacco products to adult tobacco consumers and provides them with truthful brand, availability, price and other information. *Id.* In addition, all of USSTC's advertisements for years have included the following message: "U.S. Tobacco Reminds You — Smokeless Tobacco — Not For Sale To Minors." *Id.* USSTC also uses self-service displays in the advertising of its smokeless tobacco products, which permit consumers to compare product attributes (such as freshness information) and prices without having to ask a store clerk for assistance. *Id.* at 3755-56, 3762.

It is undisputed that Massachusetts has, in recent years, seen a "steady and significant decline" in underage smokeless tobacco consumption. *Id.* at 4580. In fact, the Attorney General's submission below reveals that minors' smokeless tobacco consumption in Massachusetts dropped nearly 50% from 1993 to 1999 — from 9.4% in 1993 to 6% in 1997, with a further reduction to 4.9% in 1999. JA 284, 287. During this period of decline, the Attorney General promulgated the regulations, in his words, "to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold and distributed in Massachusetts in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age." 940 C.M.R. § 21.01. The regulations declare all outdoor cigarette and smokeless tobacco advertising, and indoor cigarette and smokeless tobacco advertising visible from or

directed toward the outside of the retail premises, within 1,000 feet of any school, public park or public playground to be "unfair or deceptive." *See* 940 C.M.R. § 21.04(5).[6] Thus, the practical effect of the regulations is virtually to ban the advertising of smokeless tobacco products in metropolitan Massachusetts. JA 164-67.[7]

The Attorney General conceded, for purposes of summary judgment, the truthful and nonmisleading

6. As to the remaining regulations challenged here by USSTC, 940 C.M.R. § 21.04(2)(c) effectively bans the use of self-service display advertising of smokeless tobacco products at retail outlets, and 940 C.M.R. § 21.04(2)(d) requires that smokeless tobacco products be placed "out of the reach of all consumers, and in a location accessible only to outlet personnel." USSTC's self-service display advertising communicates the availability of particular brands at the retail location, identifies their price, provides freshness information, and may include a selling message. Cir. JA 3757. These advertisements provide consumers with truthful information about USSTC's products and are in no way misleading. *Id.* All current self-service displays also include a diamond-shaped icon that states, "U.S. Tobacco Reminds You — Smokeless Tobacco — Not For Sale To Minors." *Id.*

7. Restrictions on outdoor advertising that the Cigarette Petitioners have accepted by way of agreement are not applicable to USSTC. In November 1998, while the regulations were still proposed and pending public notice and comment, forty-five States — but notably not including Massachusetts — resolved certain claims against USSTC by entering into the Smokeless Tobacco Master Settlement Agreement ("STMSA"). The restrictions on outdoor advertising contained in the STMSA are virtually identical to the outdoor advertising provisions contained in the Master Settlement Agreement entered into by the Cigarette Petitioners and forty-six States, including Massachusetts. However, these provisions of the STMSA are inapplicable in Massachusetts in light of the Commonwealth's failure to join the STMSA.

nature of USSTC's speech concerning a lawful activity (Pet. App. 17a), and maintained that whether USSTC's advertisements are unfair or deceptive is not "relevant to the subject matter of this litigation." Cir. JA 549-52. The Attorney General also acknowledged that the effect of the regulations is to ban tobacco advertising for the specific purpose of suppressing the content of the advertising, *i.e.*, its alleged positive imagery. *See id.* at 541-42. At the same time, from 1994 to 1999, Massachusetts spent between eleven and sixteen million dollars per year on advertising in an effort to reduce tobacco consumption among the entire population. JA 92.

With respect to alternatives to the regulations, the Attorney General has conceded that he did not consider any, other than "to rely on existing enforcement, educational and other efforts to reduce youth access to tobacco." Cir. JA 3738-39. Other alternatives to the regulations, however, are available. For example, Massachusetts does not have in place a retailer licensing scheme for the purpose of supervising compliance with laws prohibiting sales of tobacco products to minors (*id.* at 2937), or laws prohibiting "the purchase, possession or use of tobacco products by minors themselves" (*id.* at 2930). In addition, the Attorney General already has the power, without the regulations, to address any purportedly unfair or deceptive tobacco advertising. *See* Mass. Gen. Laws ch. 93A, § 4.

SUMMARY OF THE ARGUMENT

The regulations violate the First Amendment whether they are reviewed under strict scrutiny or the four-part test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

Content-based speech restrictions are presumptively unconstitutional. Any attempt to ban the content of speech because it expresses a particular message or thought with which the State disagrees should be subject to strict scrutiny, regardless of whether the speech is commercial in character or not. Here, for policy reasons entirely unrelated to ensuring a fair bargaining process, the Attorney General has promulgated a content-based regulatory scheme that effectively would ban the concededly truthful and nonmisleading advertising of smokeless tobacco products in metropolitan Massachusetts. At the same time, Massachusetts is at liberty to pursue its "war against Big Tobacco" (JA 248) through all available means, including State-sponsored anti-tobacco speech. Applying strict scrutiny, the regulations must be invalidated.

The regulations also fail to pass constitutional muster under the intermediate scrutiny test applicable to commercial speech under *Central Hudson* and its progeny. First, the Attorney General fails to demonstrate that the regulations directly and materially advance the asserted governmental interest. Indeed, his token submission as to smokeless tobacco tends to contradict or fails to support the alleged causal link between advertising and underage consumption. Second, the regulations' effective ban on advertising is far more extensive than necessary. The Attorney General has admitted that he has not even considered alternatives to the regulations, other than continuing current efforts (Cir. JA 3738-39) — the same efforts, *inter alia*, that already have resulted in a "steady and significant decline" in minors' smokeless tobacco consumption (*id.* at 4580). His refusal to consider these alternative measures is particularly troubling when the Attorney General has conceded that one of these measures — a retailer licensing scheme — has been demonstrated elsewhere to "drastically reduce" the rate of illegal sales to minors. *Id.* at 2937.

ARGUMENT

I. STRICT SCRUTINY SHOULD APPLY TO CONTENT-BASED SPEECH RESTRICTIONS THAT ARE UNRELATED TO ENSURING A FAIR BARGAINING PROCESS.

The regulations constitute presumptively unconstitutional, content-based speech restrictions that should receive strict scrutiny, despite the commercial aspects of the speech they purport to prohibit. The Court of Appeals itself reached the following conclusions that USSTC submits warrant the application of strict scrutiny: the regulations (i) are "plainly content-based" (Pet. App. 14a); (ii) do not "further the state's interest in prohibiting the dispersion of false and misleading information to consumers" (*id.* at 28a n.11); (iii) serve to "dispel[] the advertising-encouraged notion that tobacco products are pervasive and form part of the 'good life' " (*id.* at 29a); and (iv) do not proscribe "tobacco-related speech that has a purpose or effect other than promotion" (*id.* at 14a).

Despite these conclusions, the Court of Appeals applied only a *Central Hudson* analysis. In its decision, the Court of Appeals acknowledged the "recent rumblings from members of the Supreme Court and others suggesting that the *Central Hudson* test may be in need of minor or major modification," but nevertheless declined to apply strict scrutiny. *Id.* at 16a. USSTC respectfully submits that the nature of the regulations in this case merits strict scrutiny review.[8]

8. The application of strict scrutiny to the regulations is consistent with this Court's prior decisions. However, to the extent that its application here would mark a departure from existing case law, USSTC submits that strict scrutiny should apply to the regulations for the reasons set forth herein and in the Brief submitted by the Cigarette Petitioners.

A. Strict Scrutiny Applies To Content-Based Speech Restrictions.

A cornerstone of First Amendment jurisprudence is the presumptive unconstitutionality of content-based speech restrictions, which receive strict scrutiny. "Content-based regulations are presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and "a content-based speech restriction . . . can stand only if it satisfies strict scrutiny," *United States v. Playboy Entm't Group, Inc.*, 120 S. Ct. 1878, 1886 (2000).[9]

This foundation, upon which rest many of this Court's most important First Amendment decisions, exists for good reason: content suppression interferes with a central purpose of the First Amendment, that every "citizen is entitled to seek out or reject certain ideas or influences without Government interference or control." *Id.* at 1889; *see Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 195 (1999) ("presumption that the speaker and the audience, not the Government, should be left to assess the value of accurate and nonmisleading information about lawful conduct"). In addition, the urge of government officials to silence speech with which they disagree is all too great, and a strong rule that protects the content of speech from government control, backed up by strict scrutiny, helps to keep this temptation in check. "Reviewing speech regulations under fairly strict categorical rules keeps the starch in the

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9. While the regulations do not totally ban smokeless tobacco advertising, "[i]t is of no moment that [they do] not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Playboy Entm't*, 120 S. Ct. at 1886.

standards for those moments when the daily politics cries loudest for limiting what may be said." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring).

Indeed, the First Amendment does not exist to protect favored speech, but rather to ensure the viability of disfavored speech. "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate." *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting), *overruled by Girouard v. United States*, 328 U.S. 61, 68-69 (1946). Regardless of whether or not the Attorney General believes that he is serving legitimate interests by silencing tobacco companies, the First Amendment prohibits him from doing so.

These principles should be no less applicable to USSTC's advertising merely because the speech is suppressed for the stated purpose of addressing underage smokeless tobacco consumption, unquestionably a laudable goal. In *Playboy Entertainment*, this Court held that content-based restrictions must be reviewed under strict scrutiny, even when the purpose of the restrictions is to protect minors. 120 S. Ct. at 1885-87. The *Playboy Entertainment* decision thus reaffirms prior speech cases holding that an interest in protecting minors does not relieve the government of its responsibility to act in conformity with the Constitution. *See, e.g., Butler v. Michigan*, 352 U.S. 380, 383 (1957) (speech restrictions may not "reduce the adult population . . . to reading only what is fit for children" as "[s]urely, this is to burn the house to roast the pig"); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.").

B. The Regulations Effectively Ban Advertising For Reasons Unrelated To Ensuring A Fair Bargaining Process.

Commercial speech restrictions traditionally have been subject to only intermediate scrutiny because they are based on the government's interest in ensuring a fair bargaining process. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), Justice Stevens observed that this Court has endorsed the view that it "is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be subject to greater governmental regulation.' " *Id.* at 502 (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)). As Justice Stevens explained, "the State retains less regulatory authority when its commercial speech restrictions strike at 'the substance of the information communicated' rather than the 'commercial aspect of [it] — with offerors communicating offers to offerees.' " *44 Liquormart*, 517 U.S. at 499 (alteration in original) (citations omitted). Thus, this Court's "early cases uniformly struck down several broadly based bans on truthful, nonmisleading commercial speech, each of which served ends unrelated to consumer protection." *Id.* at 497-98. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) (holding unconstitutional restrictions that were designed, in part, to protect minors from "advertisements of contraceptive products . . . [that] would legitimize sexual activity of young people").

In the instant case, the regulations are not directed to ensuring a fair bargaining process, and thus the theoretical basis for applying less than strict scrutiny is absent. Indeed, the Court of Appeals was "not persuaded that the regulations further the state's interest in prohibiting the dispersion of

false and misleading information to consumers." Pet. App. 28a n.11. In addition, the Attorney General essentially has admitted as much, contending that whether USSTC's advertisements are unfair or deceptive is not "relevant to the subject matter of this litigation." *See* Cir. JA 549-52. Because the regulations strike "at the ideas conveyed and form of expression," *Carey*, 431 U.S. at 701 n.28, and not at any commercial aspect of USSTC's speech, strict scrutiny should apply.

C. The Regulations Effectively Ban Speech That Promotes Smokeless Tobacco Brands While Permitting The State To Communicate Anti-Tobacco Messages At Will.

The Attorney General has conceded that the regulations are specifically intended to suppress the alleged positive imagery associated with tobacco. *See* Cir. JA 541-42. As the Court of Appeals noted, the regulations serve to "dispel[] the advertising-encouraged notion that tobacco products are pervasive and form part of the 'good life' " (Pet. App. 29a) and proscribe only speech " 'the purpose or effect of which is to promote the use or sale of . . . tobacco' " (*id.* at 14a) (quoting 940 C.M.R. §§ 21.03, 22.03).

Yet, at the same time that USSTC's speech promoting its brands is effectively silenced by the regulations, the State is permitted free reign to communicate its anti-tobacco messages.[10] Indeed, then-Attorney General Scott Harshbarger

10. In addition to communicating other information, USSTC's advertising also presents its particular viewpoint that its smokeless tobacco products are for sale to adults only, which is captured in the following message included in all of USSTC's advertisements: (Cont'd)

announced his decision to promulgate the regulations as part of Massachusetts' continuing "war against Big Tobacco." JA 248. Massachusetts' arsenal in this "war" includes State-sponsored anti-tobacco speech. For instance, from 1994 to 1999 the Commonwealth spent between eleven and sixteen million dollars per year on television, radio, billboard and print advertising in an effort to reduce tobacco consumption among the entire population. JA 92. In addition, anti-tobacco speech by private individuals or groups is left unfettered by the regulations, because they do not proscribe "tobacco-related speech that has a purpose or effect other than promotion." Pet. App. 14a. Under the First Amendment, however, government may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392.

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message . . . ." *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).[11] Thus, despite his desire to silence USSTC, the Attorney General is not allowed to dictate the scope of a permissible, official dialogue about smokeless tobacco by

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(Cont'd)

"U.S. Tobacco Reminds You — Smokeless Tobacco — Not For Sale To Minors." Cir. JA 3756-62. It is of no moment that this viewpoint on a matter of public concern is contained within advertising, because "the interest in protecting the free flow of information and ideas is still present when such expression is found in a commercial context." *Discovery Network*, 507 U.S. at 426 n.21.

11. Strict scrutiny applies in such cases because "[v]iewpoint discrimination is . . . an egregious form of content discrimination." *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 829 (1995).

censoring the disfavored view and declaring as the gospel the State's own message. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion"). Such a regime constitutes pure thought control that is more appropriate for Orwell than for Lowell because, in our system, there can be no "Ministry of Truth." *See* George Orwell, *1984* (1949).[12]

When the State disfavors a particular message, " 'the remedy to be applied is more speech, not enforced silence.' " *44 Liquormart*, 517 U.S. at 498 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927), *overruled by Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969)). The Commonwealth has shown that it is quite capable of responding to any thoughts or messages it dislikes. As the Attorney General advised the Court of Appeals, the "Commonwealth's tobacco control efforts include . . . a sustained counter-advertising campaign." Brief of Defendant-Appellee at 8 (1st Cir.) (No. 01117). At a time when tobacco companies are being vilified, there exists an even greater need to protect USSTC's constitutional rights to promote its smokeless tobacco brands to adult tobacco consumers and to communicate its stance against the sale of smokeless tobacco products to minors.

For the foregoing reasons, the regulations should be reviewed under strict scrutiny, a test they cannot pass.

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12. Indeed, the regulations as promulgated included an express exception for State-sanctioned tobacco advertising, in the form of outdoor signs no larger than 576 square inches, that were limited in content to black text on a white background stating "Tobacco Products Sold Here." 940 C.M.R. § 21.04(6).

II. EVEN IF THE *CENTRAL HUDSON* TEST PROVIDES THE APPROPRIATE STANDARD FOR EVALUATING THE REGULATIONS, THEY FAIL TO MEET CONSTITUTIONAL REQUIREMENTS.

Even if this Court decides that the *Central Hudson* test provides the appropriate standard for assessing the constitutionality of the regulations, the Court of Appeals' decision on *Central Hudson's* third and fourth parts — which rests on a highly deferential standard of review more akin to rational basis than intermediate scrutiny — should be reversed with respect to USSTC because the Attorney General has failed to meet his "burden of . . . justifying the challenged restriction[s]." *Greater New Orleans*, 527 U.S. at 183.[13]

The Court of Appeals' decision that the Attorney General's token submission as to smokeless tobacco satisfies *Central Hudson's* third part is incorrect, and reflects a level of deference to the Attorney General's judgment that is fundamentally at odds with *44 Liquormart*.[14] *See* 517 U.S.

13. The first and second parts of the *Central Hudson* test are not at issue. The first part — that the speech at issue concern lawful activity and be truthful and nonmisleading — was not at issue in the Court of Appeals because the Attorney General conceded this point for purposes of summary judgment. Pet. App. 17a. Similarly, the second part's requirement of a substantial state interest was not challenged by USSTC. *See* Plaintiff's (USSTC's) Memorandum Of Law In Opposition To Motion For Partial Summary Judgment (First Amendment Claims) at 10 n.11 (D. Mass.) (99-11118).

14. In *44 Liquormart*, this Court specifically rejected the deferential approach to regulation applied here by the Court of Appeals. 517 U.S. at 510; *id.* at 531-32 (O'Connor, J., concurring) ("examin[ing] more searchingly the State's professed goal, and the speech restrictions put into place to further it, . . . comports better with the purpose of the analysis set out in *Central Hudson*"). Indeed, (Cont'd)

at 509-10; *id.* at 531-32 (O'Connor, J., concurring). The Attorney General's submission as to smokeless tobacco, which USSTC submits is patently inadequate, tends to contradict or fails to support the stated justification for the regulations.

With respect to *Central Hudson's* fourth part, the regulations cannot be deemed no more extensive than necessary in light of (i) the "steady and significant decline" in underage smokeless tobacco consumption that has been occurring over the past decade in the absence of the regulations (Cir. JA 4580), and (ii) numerous less restrictive alternatives to the regulations, including one that the Attorney General has recognized could "drastically" reduce the sale of tobacco products to minors (*id.* at 2937).

A. The Attorney General's Smokeless Tobacco Submission Fails To Demonstrate That The Regulations Will Directly And Materially Reduce Minors' Smokeless Tobacco Consumption.

Under the third part of *Central Hudson*, the Attorney General must demonstrate that the regulations "directly and materially advance[] the asserted governmental interest."

(Cont'd)
the Court of Appeals' extreme deference to the Attorney General seems to be more in accord with the rationale of *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), which this Court has rejected than with this Court's more recent decisions. *See Greater New Orleans*, 527 U.S. at 182 (noting that the *44 Liquormart* Court found that Supreme Court precedent "both preceding and following *Posadas* had applied the *Central Hudson* test more strictly"); *see also Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989) (" 'Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.' " (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978))).

Greater New Orleans, 527 U.S. at 188. " '[T]his requirement is critical; otherwise "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." ' " *Id.* (citations omitted). " 'This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' " *Id.* (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995) ("[A]necdotal evidence and educated guesses" are insufficient.). Consequently, the Attorney General must prove that the regulations do more than merely provide "ineffective or remote support" for the stated objective. *Central Hudson*, 447 U.S. at 564.

In the instant case, the Court of Appeals held, with respect to smokeless tobacco, that "[t]he product-specific information submitted by the Attorney General, taken in conjunction with the other statistical and anecdotal information presented," satisfies *Central Hudson's* third part. Pet. App. 27a. USSTC respectfully submits that this holding was erroneous. The Attorney General's smokeless tobacco-specific submission is meager, and what little there is tends to contradict or fails to support the Attorney General's justification for the regulations.

1. The Attorney General Cannot Rely On Information Related To Cigarette Advertising To Ban Smokeless Tobacco Advertising.

As the Court of Appeals recognized, the Attorney General's submission below related predominantly to cigarettes. Pet. App. 27a. However, the Attorney General cannot justify restrictions on speech regarding one product based on data submitted with respect to another, particularly when the data itself demonstrate a lack of parity between the products on the very issues critical to the First Amendment inquiry. *See Central Hudson*, 447 U.S. at 564 ("ineffective or remote support" insufficient); *Edenfield*, 507 U.S. at 770 ("mere speculation or conjecture" insufficient).

According to the Attorney General's submission, while cigarette smoking among ninth through twelfth-graders in Massachusetts increased between 1993 and 1997, smokeless tobacco consumption within the same population sample "declined steadily" and "significantly" (Cir. JA 1074-75, 1078); while minors were successful 42% of the time when illegally purchasing cigarettes, minors were successful 15% of the time when purchasing smokeless tobacco (*id.* at 2471); and while cigarettes were accessible to shoplifters in 50.5% of subject outlets in a survey, smokeless tobacco was accessible to shoplifters in 6.1% of the same outlets (*id.* at 2477). Given this lack of parity, the Attorney General's reliance on data relating to cigarettes to censor smokeless tobacco advertising cannot survive scrutiny under *Central Hudson*.

2. The Attorney General's Smokeless Tobacco Submission Tends To Contradict Or Fails To Support His Justification For The Regulations.

As an initial matter, the Attorney General's extremely limited smokeless tobacco-specific submission includes a 1999 Massachusetts Department of Education survey that shows that smokeless tobacco usage among minors in Massachusetts has "declined steadily" and "significantly" since 1993, from 9.4% in 1993 to 6% in 1997 (Cir. JA 1074, 1078), with a further reduction to 4.9% in 1999 (JA 284, 287). This decline has occurred in the absence of the regulations.

In addition, an "observational study" relied upon by the Attorney General tends to contradict the Attorney General's proposition that advertising causes minors' demand for tobacco products. Cir. JA 2469-89. This study observed a "lack of association between illegal sales rates and advertising" and noted that "others have reported similar findings." *Id.* at 2482.[15] Another study cited by the Attorney General (2516-22), which was conducted in California in 1990, 1992, and 1993, found that advertising was "associated" with consumption but questioned the "directionality of the relationship," stressing that an association between perception of advertising and consumption does not "provide evidence suggesting a causal link" (*id.* at 2521).[16]

15. Indeed, the expert testimony of record confirms that family influence and peer pressure — not advertising — principally influence whether minors will consume tobacco products. JA 151-52.

16. There are other examples that reveal the self-contradictory or irrelevant nature of the Attorney General's submission with respect to smokeless tobacco. For instance, two other "studies" in the (Cont'd)

Finally, the Attorney General's smokeless tobacco submission includes conclusory statements made by the Food and Drug Administration (the "FDA"). In connection with the adoption of its vacated rule concerning tobacco products, the FDA asserted that a shift in smokeless tobacco consumption trends during the 1970s and early 1980s signaled the "effectiveness of advertising." *Id.* at 1531.[17]

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Attorney General's submission mention advertising and smokeless tobacco, but they do not address whether any causal link exists between smokeless tobacco advertising and minors' consumption. The first, written over ten years ago, describes smokeless tobacco advertisements from roughly fifteen to thirty years ago. Cir. JA 2559-66. It does not discuss USSTC's point-of-sale and outdoor advertising, let alone USSTC's current advertising. The other study is entitled, *Smokeless tobacco brand preference and brand switching among US adolescents and young adults*. *Id.* at 2490-95. The purpose of this study was, *inter alia*, to "describe the brand preference of young smokeless tobacco users" as it related to duration and intensity of consumption (*id.* at 2490) — not whether there is a causal link between smokeless tobacco advertising and minors' consumption. Also, the Attorney General's submission includes the 1994 Report of the Surgeon General, *Preventing Tobacco Use Among Young People* (*id.* at 1203-376), which contains isolated paragraphs that purport to address smokeless tobacco marketing and usage trends in the 1970s and the mid-1980s (*id.* at 1336). This report, however, does not rely on current information or analyze whether there is a causal link between smokeless tobacco advertising specifically and minors' consumption.

17. Even assuming, *arguendo*, that the FDA's conclusory opinion could help justify the regulations, the FDA rulemaking pursuant to which the statement was made was held by this Court to be beyond the FDA's jurisdiction. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). The FDA revoked and removed the subject regulations after this Court's ruling that it lacked jurisdiction. *See* Regulations Restricting the Sale (Cont'd)

The FDA rulemaking, however, addressed only alleged decades-old marketing, and, in any event, the agency conceded that there is not a single study that "[e]stablish[es] that advertising has an effect of directly causing minors to use tobacco products." *Id.* at 1523.[18]

If the third part of *Central Hudson* can be satisfied by this record, which actually tends to contradict or does not support the Attorney General's justification for the regulations as to smokeless tobacco, then surely the requirement is rendered meaningless. *See Edenfield*, 507 U.S. at 772 (invalidating speech restrictions when evidence tended to "contradict[], rather than strengthen[]" the justifications for the restrictions). In *44 Liquormart*, 517 U.S. 484, Justice Stevens reasoned that in the absence of any evidence it could not be assumed for third prong purposes that price advertising for alcohol affected temperance. *See id.* at 505-07. Similarly, the Court of Appeals here could point to no relevant evidence demonstrating a causal link between smokeless tobacco advertising and consumption by minors, and in essence relied instead only on the kind of " 'speculation and conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest." *Id.* at 507 (citation omitted).

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and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents; Revocation, 65 Fed. Reg. 17135, 17136 (Mar. 31, 2000).

18. In another example of its overly deferential approach to the regulations, the Court of Appeals expressly recognized USSTC's objection that the purported basis for the FDA's conclusory statement in its rulemaking was "dated" and "d[id] not specifically evaluate the impact of outdoor advertising," but nonetheless held that "such objections demand more than *Central Hudson* requires." Pet. App. 23a.

B. The Regulations' Ban On Advertising Is Far More Extensive Than Necessary.

The fourth *Central Hudson* requirement is that the restriction must not be more extensive than necessary to serve the asserted interest. *Central Hudson*, 447 U.S. at 566. Given that the regulations were promulgated during the midst of a period of steady and significant decline in minors' consumption of smokeless tobacco products, and without regard for less restrictive means of further reducing minors' consumption, they cannot meet this part of the test. As an initial matter, the best proof of the regulations' failure to meet the fourth part is reflected by the Court of Appeals' conclusion, based on the Attorney General's own submission, that "current efforts seem to be bearing fruit" with respect to the noted decline in underage smokeless tobacco consumption. Pet. App. 24a. If the asserted interest is being well-served in the absence of speech restrictions, how can it possibly be said that the regulations are no more extensive than necessary?

Further, the Attorney General has conceded that he did not consider any alternatives to the regulations, other than "to rely on existing enforcement, educational and other efforts to reduce youth access to tobacco." Cir. JA 3739. As might be expected, there are numerous alternatives to banning USSTC's speech that would directly advance the Attorney General's stated purpose of reducing minors' consumption of smokeless tobacco products. Notably, Massachusetts has no licensing scheme to supervise compliance with laws prohibiting sales of tobacco products to minors. Yet the Attorney General's 1994 survey found that such a licensing program could "drastically reduce the sale of tobacco products to minors." Cir. JA 2937. In addition, minors could

be prohibited from purchasing, possessing, or consuming tobacco products. Furthermore, enforcement of existing laws that penalize the sale of tobacco (such as Mass. Gen. Laws ch. 270, § 6) could be strengthened, such as by encouraging retailers to use electronic age verification measures.[19] Finally, the Attorney General already has the power to combat advertising that actually is unfair or deceptive on a case-by-case basis. *See* Mass. Gen. Laws ch. 93A, § 4. Such an approach would be far less restrictive than the current declaration that all smokeless tobacco advertising is, *ipso facto*, unfair and deceptive.[20]

It can hardly be said that the regulations' effective ban on smokeless tobacco advertising is no more extensive than

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19. Four States to date have adopted legislation authorizing retailers to use such verification measures. *See* Fla. Stat. Ann. ch. 569.4 (West Supp. 2001); N.Y. Pub. Health § 1399-cc (McKinney Supp. 2001); Ohio Rev. Code Ann. §§ 2927.021, 2927.022 (West 2000); Wyo. Stat. Ann. § 14-3-302 (West 2000).

20. Moreover, the regulations' effective ban on advertising leaves no adequate, alternative means for USSTC to communicate, *inter alia*, its age of purchase message, "U.S. Tobacco Reminds You — Smokeless Tobacco — Not For Sale To Minors," selling message, product availability, freshness information, and price at retail locations. Cir. JA 3755-57. In *44 Liquormart*, this Court's ruling that the advertising restriction at issue was more extensive than necessary was based on the following: "[the restriction] prevent[ed] sellers of alcohol from communicating price information anywhere but at the point of purchase," "[n]o channels exist[ed] at all to permit them to publicize the price," 517 U.S. at 530-31 (O'Connor, J., concurring), and alternatives to the price advertising ban were available, *id.* at 507. For the same reasons, the regulations here are more extensive than necessary and fail *Central Hudson's* fourth part. *See also City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994) (recognizing there was "no practical substitute" to prohibited residential signs).

necessary, in light of the steady and significant decline in minors' smokeless tobacco consumption in the absence of the regulations, the foregone alternatives noted above, and the Attorney General's existing ability to proceed against advertising that is, in actuality, unfair or deceptive.

CONCLUSION

For the foregoing reasons, Petitioner USSTC respectfully requests that this Court reverse the judgment of the Court of Appeals.

Respectfully submitted,

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